



United States Department of Agriculture
Food and Nutrition Service

Southeast Region

Reply to

Attn. of: SA 9-1

April 15, 2004

Subject: SERO Policy 210.16-08: Food Service Management Company (FSMC) Contract Oversight Requirements for School Food Authorities (SFAs) Contracting with (FSMCs)

To: All State Directors
National School Lunch Program
Food Distribution Program
Southeast Region

Office of Inspector General (OIG) Audit Report 27601-0027-CH, Food Service Management Companies (FSMCs), included a recommendation concerning contract monitoring requirements. This memorandum provides guidance for report recommendation No. 3 from the subject report.

OIG has recommended that Regional offices instruct their State agencies and their SFAs that FSMCs must comply with the terms as listed in procurement solicitation and contract documents. Only minor deviations to procurement solicitation and contracts are permissible and material deviations require rebidding. In addition, State agencies that use prototype solicitation and contract documents should notify their SFAs of the procedures that must be followed when the SFA opts to change the State agency's prototype documents.

In its audits of SFA and FSMC contracts, OIG identified repeated instances in which FSMCs ignored amended, deleted or changed solicitation and contract terms, including changes to prototype bids and contracts that had been previously approved by the State agency. As a result of these actions, OIG identified instances where FSMCs:

1. Failed to pass through the value of USDA donated foods contrary to specific solicitation and contract requirements and
2. Pre-credited the value of USDA donated foods when the solicitation documents did not address pre-crediting.

While OIG specifically addressed the issue of noncompliance with solicitation and contract documents related to the use of USDA donated foods, the potential effect is much greater. Failure to comply with specific solicitation and contract terms is contrary to good business practices and a violation of the long-standing program and Departmental regulations regarding competitive procurements. These competitive procurement requirements were first established for the National School Lunch Program in 1978. While minor changes have been made to these requirements over the last 26 years, the fundamental requirements have not changed.

Program and Department regulations require that all potential contractors have an opportunity to compete on a fair and equal basis. Consistent with these regulations, the solicitation documents must clearly set forth all requirements that offerors must fulfill and all other factors to be used in evaluating bids or proposals. These solicitation documents must also identify the basis upon which contract award will be made. When a contractor is permitted to ignore or change solicitation requirements, competition has been impaired and the procurement process has been compromised. The only appropriate remedy for this deficiency is to conduct a new and proper procurement.

Every SFA must maintain a system of contract administration that ensures its contractors perform in accordance with the terms, conditions and specifications of their contracts. As part of this system, the SFA must monitor and enforce its contract terms. Further, all contracts, except small purchase, that are funded in whole or in part with nonprofit food service account funds, must contain provisions that allow for administrative, contractual or legal remedies for instances when contractors violate or breach contract terms and provide for sanctions or penalties as may be appropriate. A contractor's failure to comply with a specific contract requirement is a violation of the contract that must be addressed promptly by the SFA.

Minor and Material Changes:

A situation may arise when a minor change is needed to the solicitation documents or the terms of a contract. Unless prohibited by applicable State or local requirements, the procurement process can continue when a minor change to the solicitation document is made, as long as the change is provided to all potential contractors in a timely manner. The same holds true for amending an executed contract. When a minor change is needed, a contract amendment can be prepared by the SFA and signed by both parties. However, using these procedures to revise solicitation documents or amend a contract when a material (major) change is necessary is not permissible.

The distinction between a minor change and a material change cannot be quantified for every procurement action undertaken in the CN programs. However, at a minimum, a change is material when other competitors would respond differently to the solicitation document had the other competitors known of the change. For example, if the solicitation document required daily deliveries between 7 am and 9 am, but the selected contractor requests a change in the contract terms to anytime daily deliveries, the change is material. On the other hand, if the contractor requests a change in the contract specifying a daily delivery timeframe of 7:15am-9:00 am, the change is not material.

When changes to solicitation or contract documents are being considered, the SFA must remember that *if the potential contractor drafts the amended solicitation documents, the potential contractor becomes ineligible for contract award pursuant to Departmental regulations.*

Changes to prototype procurement and contract documents:

In some cases, State agencies have developed prototype solicitation and contract documents that ensure program requirements are met. The Department regulations provide that an SFA must make information about its procurement available upon request by the State agency when a proposed contract modification changes the scope of a contract (3016.36(g)(2)(v)). As a result, the State agency has the authority pursuant to Department and Program regulations to require prior approval of changes to its approved prototype solicitation and contract documents. Further, when a State agency determines that the proposed or actual change to these documents is not acceptable, the State agency is obligated to require the SFA take corrective action to remedy the deficiency. State agencies have a variety of corrective action options available depending on the severity of the deficiency and the SFA's willingness to take timely corrective action. The options range from requiring the SFA correct the procurement and contract documents, disallowing the use of nonprofit food service account funds to pay for contract costs, requiring the SFA conduct a new procurement, or in the most serious cases, withholding of Program payments until the State agency receives acceptable corrective action from the SFA.

SFA responsibilities for correcting procurement and contract deficiencies:

When the SFA is notified or determines, itself, that its procurement process or contract is deficient, the SFA must undertake corrective action to remedy the deficiency as soon as possible. When a contract does not comply with the solicitation document, the SFA may not extend or renew the contract, but must initiate a new procurement action at the end of the current contract period. For example: On September 15, 2003, the SFA identifies a material defect in its FSMC contract. The contract was executed on July 1, 2002, with provisions for four one-year renewals. The SFA cannot renew the contract after its current term expires on June 30, 2004, but must conduct a new procurement action.

Please provide this information to your SFAs and request that they take action as appropriate to ensure compliance with these critical issues of program administration.

If you have any questions regarding this matter, please contact this office.

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